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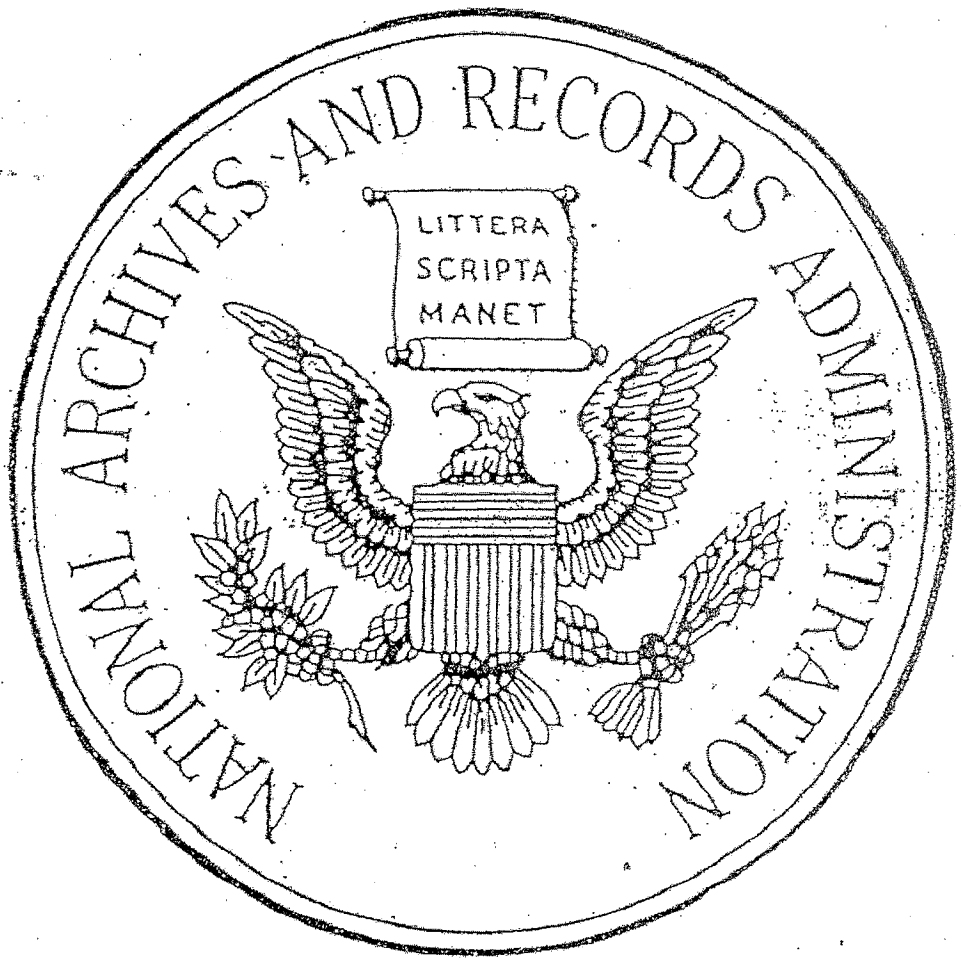

Scientology

Memorandum

file scientology

Subject	Date
Access to documents seized from Church of Scientology	AUG 6 1984

To
Ms. Carolyn Kuhl
Deputy Assistant Attorney General
Civil Division

From
David J. Anderson
Director
Federal Programs Branch
Civil Division

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improperly disseminated the seized documents and that the seized documents have been retained by the U.S. Attorney's Office for an unreasonable period. Copies of the documents were provided by the U.S. Attorney's Office to Chuck Kruse of the Torts Branch for use in the defense of the lawsuit.

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Following extensive, informal discussions between Richard Greenberg of this office and Judith Hetherton, access to the documents was formally requested by letter dated July 13, 1984. (Attachment A) At that time, the plan was that the documents would be provided to the Branch for inspection and copying. Concurrent notice would be provided to the Church to permit the Church to assert whatever rights it might believe it had pertaining to the documents. Following inspection of the documents and any related litigation, we planned to submit the pertinent documents under seal to the Court with a request that the United States be permitted to publicly release the documents, or alternatively, be permitted to use the documents as necessary in its defense of the Church's claims.

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This question, however, was subsequently litigated. By decision rendered on February 17, 1982, Judge Aubrey Robinson held that the seal placed on the court's set of the documents ran to the originals in the hands of the government. That decision was prompted by the fact that (1) a private citizen requested access to the U.S. Attorney's originals to authenticate documents she had previously obtained, and (2) the Tax Division requested a declaratory ruling on the issue because the Tax Court had refused to admit a document into evidence because of the Tax Court's fear that the document was subject to the sealing order. The United States moved for reconsideration of Judge Robinson's ruling, and, by decision dated June 10, 1982 (Attachment C), Judge Robinson vacated his earlier opinion and held that the documents in the hands of the U.S. Attorney were not subject to the sealing order. The court held that only the disposition agreement governed the U.S. Attorney's use of the originals held by the U.S. Attorney.

This decision was appealed by the Church. In United States v. Hubbard, 686 F.2d 955 (D.C. Cir. 1982) (Attachment D), the court affirmed and modified Judge Robinson's second opinion in a decision that is somewhat ambiguous on key points. Although the court recognized that it was dealing with a set of documents that had not previously been before the court, 686 F.2d at 957, the court failed to explicitly address the question of whether the sealing order for the set of the documents filed with the court ran to the originals held by the U.S. Attorney. Instead, the court framed the issue as "whether the district court in the District of Columbia should bring about public disclosure, at the request of these parties, of the particular documents at issue in this litigation." 686 F.2d at 959. Because of the Church's potential "privacy" interests, the court modified the district court's order to provide that, although the parties may have access to the documents, the documents were to be main-

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Conclusion

In sum, there is no outstanding order, agreement or precedent barring our examination of the documents or justifying the conditions the U.S. Attorney seeks to impose in providing access to the documents to the Branch. Although the U.S. Attorney's dissemination and retention of the documents is apparently an issue in the California case, we do not see how our examination of the documents affects the government's position in the California case to any greater extent than the U.S. Attorney's supplying the documents to the Torts Branch for the defense of that suit. It follows from this that the conditions proposed by the U.S. Attorney's Office are unwarranted, as well as impractical and would seriously prejudice our ability to bring the D.C. case to a close. Any concerns of the U.S. Attorney should

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FILE COPY
Richard
JUL 13 1984

DJA:RGreenberg:stl
145-12-3526

Telephone:
(202) 633-3368

A

Mr. Joseph E. diGenova
United States Attorney
District of Columbia
3rd & Constitution Ave., N.W.
Washington, D.C. 20001

Re: Founding Church of Scientology v. Director, FBI, et al., C. A. No. 78-0107 (D.D.C.)

Dear Mr. diGenova:

Pursuant to discussions between Richard Greenberg of my staff and Ms. Judith Hetherton this week, this is to request that access to the documents seized by the Federal Bureau of Investigation from the Founding Church of California on July 8, 1977, be provided to the Civil Division of the Department of Justice acting in its capacity as counsel for the defendants in the above-entitled action. Such access is authorized pursuant to paragraph 8 of the disposition agreement concerning the documents which is reprinted at United States v. Heidt, 668 F.2d 1238, 1287 (D.C. Cir. 1981). Of course, we will comply with the pertinent provisions of the disposition agreement prior to publicly disclosing or disseminating the documents. In addition, out of an abundance of caution and to ensure that the Church has an opportunity to protect whatever rights it may believe it has with respect to these documents, it might be appropriate for a letter to be addressed to the Church advising of this request for access to the documents.

The documents for which access is sought appear to contain information pertaining to misconduct of the Founding Church of Scientology, its statewide units and its members. This information may be critical to the defendants' ability to demonstrate that plaintiffs in the above-entitled action are not entitled to injunctive relief due to their unclean hands. By Order dated June 25, 1984, Judge Joyce Hens Green has authorized the defendants to commence discovery pertaining to plaintiffs' unclean hands, and inspection of these documents will facilitate our defense of the action.

Thank you for your assistance with this matter. If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

DAVID J. ANDERSON
Branch Director
Federal Programs Branch
Civil Division

It is therefore too plain from the affidavits for further discussion that there were many people who actually handled Mrs. Hubbard's correspondence and could testify with respect to it. Some of them were far better qualified for certain periods to so testify than Kember because they actually handled the correspondence at Hubbard's elbow when Kember was miles away. They might also be able to testify to any documents that incriminated Hubbard and were destroyed pursuant to the "Red Box" program. And Kember could not testify as to knowledge Hubbard may have gained from other sources. It is thus clear that Kember was not the only witness who might testify to substantially the same facts, and that no witness could testify to the state of Hubbard's mind or as to the extent of her own knowledge except herself. The Guardian's Office was alleged to have "more than 1050 full-time staff." J.A. at 923. With such a plethora of potential witnesses it cannot be concluded that Kember is the *only* witness. The admissibility of the critical parts of Kember's testimony was thus highly questionable and there were other witnesses who were better qualified to testify to the basic facts from which such knowledge would be deduced or denied.

D. *The Effect of the Disposition Agreement*

A further consideration at this time is the fact that Hubbard and the other defendants were found by the court, on the pleading of the defendants, to have entered into a Disposition Agreement (see Appendix) which called for the court to decide the case on a "Stipulation of Evidence." J.A. at 348–61. The agreed "Disposition" essentially amounts to an admission of guilt on the "stipulated record" to one count of the indictment and limits the challenges the defendants might assert to any conviction. As set forth above, the Disposition Agreement between the parties provided, *inter alia*, that the defendants agreed "not to challenge the sufficiency of the evidence . . . on appeal [and to refrain from] assert[ing] that the facts alleged do not amount to a violation of the crime charged *because of other considerations.*" J.A. at 356–58. (emphasis _____) Hubbard's present attempt on appeal to remand the case to secure the immunized *factual testimony* of Kember, or to have the case dismissed for failure to secure such factual testimony, constitutes an attempt to introduce additional evidence in violation of this agreement. Her motion in this respect therefore would be denied on such grounds if we had not already found that it did not lie under sections 6002 and 6003, and that the factual support for it was insufficient. It is also significant that Hubbard did agree on the *facts* in the stipulated record to "be found guilty on Count twenty-three of the indictment" charging conspiracy to obstruct justice in violation of 18 U.S.C. § 1503 and several other offenses.[87]

[25] We therefore affirm the action of the government in refusing to grant "use" immunity to Kember and the court's refusal to order such immunity. Apart from the fact that "use" immunity was not required to be granted, it would have been foolhardy to grant such immunity as it would have increased the government's burden of proof against a defendant who it appeared from the record was the highest official of Scientology with admitted guilty knowledge of the indicted crimes. The Attorney General must approve the grant, and the United States Attorney must be satisfied that the testimony is necessary to the public interest.[88] It would obviously not have been in the public interest to hazard the prosecution of Kember with all the potential objections that might evolve from granting "use" immunity to her.

APPENDIX

DISPOSITION AGREEMENT

The Court finds that the government and the defendants in this case agreed to the following:

87. Convictions were entered in accordance with the Disposition Agreement.

88. *See* 18 U.S.C. § 6003, set forth in note 84 *supra*.

APPENDIX—C

1. Defendants Hubba
Weigand, Willardson, Ra
will be found guilty upo
three of the indictment,
defendants with conspira
tice, by the trial court
record;

2. Defe[n]dant
guilty upon Count
which charges the d
acy to illegally obt
ments, by the trial cou
record;

3. Defendant Thom
guilty upon any misde
contained in the indic
court upon a stipulate
specific count chosen

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APPENDIX—Continued

1. Defendants Hubbard, Heldt, Snider, Weigand, Willardson, Raymond, and Wolfe will be found guilty upon Count Twenty-three of the indictment, which charges the defendants with conspiracy to obstruct justice, by the trial court upon a stipulated record;

2. Defe[n]dant Hermann will be found guilty upon Count One of the indictment, which charges the defendants with conspiracy to illegally obtain government documents, by the trial court on a stipulated record;

3. Defendant Thomas will be found guilty upon any misdemeanor theft count contained in the indictment by the trial court upon a stipulated record with the specific count chosen by the government;

4. The remaining counts in the indictment shall not be dismissed pending disposition of any appeals brought by the defendants. In the event that a conviction of a particular defendant is reversed or vacated as a result of judicial review, the government retains the option of proceeding on any of the remaining counts as to that defendant. In the event that the conviction of any defendant is not reversed, all remaining counts as to that defendant shall be dismissed with prejudice upon entry of the final judgment of conviction.[4] [*] It is understood that the appellate process may include proceedings on certiorari in the United States Supreme Court;

5. The government retains the right to allocute on matters in any fashion it chooses as to all defendants except the defendant Hubbard. As to the defendant Hubbard, the government agrees to advise the Court as follows: "the government takes no position and is making no request on the matter of sentence with respect to the defendant Hubbard." It is understood that Mrs. Hubbard through her counsel will make no statement in allocution concerning the facts of the case. It is further agreed that as to any defendant, including Mrs. Hubbard, the government may dispute any statements of fact on any matter with which it has disagreement;

6. In the event that any defendant receives a term of incarceration as a result of conviction in this case, the government will not object to his or her incarceration in a minimum security institution currently designated level one by the Bureau of Prisons.

7. Should the Bureau of Prisons or the Parole Commission request of the government its view as to the category of the severity of the offense of which the defendants have been convicted, the government will not tell these agencies that the offenses involved more than $2,000 in property value;

8. The government reserves the right to attach any or all of its designated case-in-chief documents to the stipulated record to support findings of guilt by the trial court. The defendants have agreed not to challenge the sufficiency of the evidence before the trial court or on appeal. That is, the defendants will not challenge the accuracy of the facts stipulated by the government, and the defendants will not assert that the facts alleged do not amount to a violation of the crime charged because of other considerations. The government shall oppose any attempt of the defendants to have the stipulated record sealed. With respect to all documents seized during the searches in California on July 8, 1977, the government retains the right to distribute copies of such documents to state and federal law enforcement agencies and other agencies of the federal government. It is further agreed that these documents will not be made available by the government to the press or to any private individuals or entities except pursuant to lawful subpoena and following ten days' notice to the Church of Scientology;

10. The stipulated record upon which the defendants are to be convicted will be prepared by the government and submitted to the defense two days after the day upon which the agreement is finalized. The defense will be given twenty-four hours to

* Since no footnotes to this Agreement appear in Judge Richey's opinion or elsewhere in the record, the court assumes that the superscript "4" here is a typographical error.

APPENDIX—Continued

comment on and propose additions to the stipulated record. The government may accept or reject the defendants' proposed changes;

11. The government has made no promises with respect to immunity from prosecution in other jurisdictions.

(J.A. 356–358).

WALD, Circuit Judge (concurring in part, and concurring in the result):

I concur in the result in this case, but I cannot agree with all the rhetoric in sections I and III–VI of the court's opinion. Regarding section II, which treats the search and seizure issue, I concur in the opinion, except for the court's discussion of the search of Mrs. Lawrence's office at Fifield Manor,[1] and the degree of preparation required of agents conducting complex document searches.[2] I would also clarify the application of the "scrupulous exactitude" test in this case.[3] I confine my remarks to the latter three issues.

The court properly states the law that "the authority to search granted by any warrant is limited to the specific places described in it, and does not extend to additional or different places."[4] I find, however, that Mrs. Lawrence's office was nowhere mentioned in the warrant and the searching officers could not reasonably have believed that her office constituted part of the "suite of offices of Mr. Henning Heldt[.]" J.A. at 155 (warrant's description of the place to be searched). I find appellants' arguments on this issue[5] persuasive: the Lawrence office was a separate, free standing structure, independently locked, with no external markings of any sort to indicate that it constituted part of someone else's office in the main building. It is highly significant that access to the Heldt suite of offices in the main building would not provide access to the Lawrence structure.[6] In addition, the only indication whether this structure—nowhere referred to in the warrant—was or was not part of the Heldt suite came from Mrs. Lawrence, who said it was her own office, not Mr. Heldt's, and that she did not work for him.[7] Of course, as the court says, Mrs. Lawrence "should [not] have been permitted to lay down the boundaries for the agents' search."[8] But her remarks are worthy of attention not only because they represent the only specific statement which the agents had before them to judge whether the structure was or was not part of the Heldt suite, but also because they corroborated the physical evidence indicating the separateness of the structure from the Heldt suite. For these reasons, I am convinced that entry into Mrs. Lawrence's office was outside the scope of the warrant and unlawful. I am in accord with the *per curiam* opinion, however, insofar as it concludes that even if this search of the Heldt suite were outside the warrant, the circumstances under which it was conducted do not represent such flagrant disregard for the warrant as to convert the search into a general one requiring total suppression of all documents seized.[9]

In its discussion of the preparation required of agents who undertake searches for documents, the court states that "the agents should be familiar with the general nature of the crimes that are charged and the list of items they are authorized to seize, either through reading of the warrant or through adequate instructions *or supervision* from those in charge."[10] I certainly agree that it is improper for a search of this magnitude to be undertaken unless those participating in it familiarize themselves with the list of partic rized to seize. But I first-hand reading of oral communication minimum preparation ceive before conducti of this kind. I cannot "supervision" the co would suffice to fam list of particulars th told about nor read. that "the arrival of a gent of inadequately this particular case general search which clusion of all seized d

Finally, although court's discussion of t tude" test as far as that the need for mi ing document sear where the documents "the ideas which they ticularity requiremen "the most scrupulou cases, "the protection freedoms [might be le officers charged wit rant[.]" *Stanford v.* 478, 485, 85 S.Ct. 50 431 (1965); *see Zurc* 436 U.S. 547, 564, 9 L.Ed.2d 525 (1978). that most of the do warrant were allege content was irreleva for their seizure. It ever, that at least 152–62 in the warr tained in the docume been, the basis for th documents were subj cause they evinced s conspiracies against some documents in to seizure only beca intent to violate the

1. *See* per curiam opinion pp. 1262–1266 *supra*.

2. *See id.* at 1261–1262.

3. *See id.* at n.33.

4. *Id.* at 1262.

5. *See id.* at 1262.

6. *See id.* at n.50.

7. *See id.* at n.52.

8. *Id.* at 1263–1265.

9. *See* cases cited *id.* at 1259.

10. *Id.* at 1261–1262 (emphasis supplied).

11. *Id.*

12. *See id.* at n.33.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 78-0401

MARY SUE HUBBARD, et al., :

MEMORANDUM OPINION

In July 1977, the Federal Bureau of Investigation (FBI) executed search warrants for the Los Angeles office of the Church of Scientology. During the ensuing criminal trial of nine Church officials, the defendants challenged the validity of the search and seizure; in the course of that challenge, copies of many of the seized documents were placed under seal in this Court. The Government, however, retained the original documents. In October 1979, the trial court issued an order unsealing most of the documents. They remained unsealed and open to public scrutiny for nine months, until the Court of Appeals ordered the documents resealed. United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980).

In February 1982, this Court was called upon to interpret the scope of the Court of Appeals' sealing order. The Internal Revenue Service had filed a motion seeking to use a copy of one of the Government's documents in its Tax Court litigation with the Church. In addition, Paulette Cooper, a third party embroiled in civil litigation

with the Church, sought to depose an FBI agent and a United States Attorney, and in connection therewith, subpoenaed some of the Government's documents. Ms. Cooper had obtained copies of some of the documents during the unsealing and sought access to the Government's originals in order to authenticate her copies. The Church opposed the subpoenaes and moved for a protective order. Because the depositions were scheduled to take place in Washington, D.C., the dispute came before this Court.

At issue in both motions was the status of the original documents in the Government's possession and the use, if any, to which they could be put. On February 17, 1982, this Court ruled that the Government's original documents, as well as copies obtained by third parties during the unsealing fell within the scope of the Court of Appeals' sealing order.[1/]

Currently before the Court are three motions precipitated by that February 17 Order. The Government and Ms. Cooper have filed separate motions asking the Court to modify the order to hold that the Government's documents are not under seal but are governed solely by the disposition

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1/ However, because the Court of Appeals did not foreclose any use of the sealed documents, and because both the Government and Ms. Cooper articulated strong interests in favor of disclosure for their respective purposes, the Court allowed access to the documents requested.

agreement negotiated by the Government and the original nine defendants. They contend that an unpublished January 19, 1982 decision by the Court of Appeals[2/] casts this Court's interpretation of the sealing order in doubt. At the time this Court entered its February 17 order, neither the parties nor the Court had been apprised of the Court of Appeals ruling.

The Times Publishing Company moves to intervene in support of the position urged by the Government and Ms. Cooper. The Times claims that, as a third party who acquired copies of the documents during the unsealing, it is directly affected by the Court's Order and should be granted intervention pursuant to Rule 24(b).[3/]

2/ The ruling was in response to the Church's Motion for Recall of the Mandate. The Church requested that the mandate be recalled and modified to require the return to this Court of all copies of documents or extracts or abstracts therefrom which were obtained by private persons during the unsealing; to enjoin further use of such copies, extracts or abstracts; and to make the sealing order effective nunc pro tunc to the time of the unsealing. The Court of Appeals found the case "particularly ill-suited for resort to the extraordinary remedy of recalling a mandate" and denied the motion.

3/ In addition, Ms. Cooper has filed a motion to compel the attendance of FBI Agent Joseph Varley and a United States Attorney at their duly noticed depositions; this Court ruled on February 17 that the depositions could go forward, but both deponents "declined" to be deposed until the pending motions for modification are resolved. Moreover, counsel representing Ms. Cooper in her New York litigation against the Church have requested the Court to permit access to the Government's documents for the purpose of authenticating Ms. Cooper's copies for use in that litigation. In light of this Court's disposition of the Motions for Modification, these requests are moot.

The Court has carefully reviewed the Court of Appeals' January 19 ruling and, in light of that decision, concludes that the sealing order imposed by that Court is not as broad as this Court construed it on February 17. This Court is now persuaded that, when the Court of Appeals imposed the seal in United States v. Hubbard, supra, it intended to seal only those documents actually located in the court files; the original documents still in the Government's possession were to be governed solely by the terms of the disposition agreement negotiated by the Government and enforced by order of October 8, 1979. That agreement provides that:

> With respect to all documents seized during the searches in California on July 8, 1977, the government retains the right to distribute copies of such documents to state and federal law enforcement agencies and other agencies of the federal government. It is further agreed that these documents will not be made available by the government to the press or to any private individuals or entities except pursuant to lawful subpoena and following ten days' notice to the Church of Scientology. 4/

Thus, the Government's dissemination of the documents is not confined to state and federal law enforcement agencies; the agreement unequivocally permits the Government to make the documents available to "other federal agencies." The Internal Revenue Service is unquestionably such an agency, and its proposed use of document "FX" in the Tax Court litigation is

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4/ United States v. Hubbard, Cr. No. 78-401, slip op. at 11 (D.D.C. Oct. 8, 1979).

wholly proper. Document "FX" may therefore be introduced into the Tax Court without further ado, and without the burden of an accompanying sealing order.

The Government may also provide copies of the documents to the public, following a lawful subpoena and ten days' notice to the Church of Scientology. The Church's interest in the documents, for which the Court of Appeals expressed such solicitude, is safeguarded by the notice provision, which affords the Church ample opportunity to challenge the subpoena. Indeed, the Church availed itself of the notice provision here, when it filed its motion for a protective order in response to Ms. Cooper's subpoenaes. Because the February 17 Order denying the Church's motion is hereby vacated, the Court now considers the appropriateness of a protective order. As the Court noted in its February 17 Memorandum Opinion

> Ms. Cooper is not asking for any documents that she has not already seen or for any documents copies of which she does not have. She seeks the government's originals for the limited purpose of authenticating her copies. She does not wish to retain the government's originals; she requests only that they be produced for use at the depositions. She needs to authenticate her documents in this manner because the Church is unable to stipulate to their authenticity. Without the access she seeks, she may well be unable to introduce her documents into evidence and the rights of a "grievously injured" victim will be jeopardized. Finally, the Church suggests no particularized privacy or other

> interests that weigh against disclosure. There is no claim that the documents contain intimate details of personal lives, attorney-client materials, or the like; nor is there any hint of "prejudice" that might attend disclosure of the documents.

(footnote omitted; emphasis in original). The Court therefore held that Ms. Cooper's interest in access to the documents outweighed the Church's interest in their continued nondisclosure. The Church's Motion for Protective Order still suggests no adequate reasons for denying Ms. Cooper access to the documents identified in her subpoenaes. The Motion is therefore denied, and the depositions shall proceed forthwith.

The Court is further persuaded that the Court of Appeals did not intend to extend the seal to copies of the documents which were obtained by third parties during the unsealing period. Those copies were obtained lawfully and in good faith, from court files that were open for public inspection and copying. During the nine months that access was permitted, numerous individuals copied the documents. It is, of course, impossible to determine the identities of all the individuals who availed themselves of the unsealed records, and equally impossible to enforce any sealing order with respect to the use of their copies. Extending the seal to copies of the documents in the hands of third parties would, as the Court of Appeals suggested, "extend the Court's mandate to unknowable limits [and] would realistically be unenforceable as well."

In light of the foregoing, the Motion by Times Publishing Company for Leave to Intervene in these proceedings is denied.

An appropriate Order accompanies this Memorandum Opinion.

Aubrey E. Robinson, Jr.
United States District Judge

DATE: June 10, 1982

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA :

v. : CRIMINAL NO. 78-401

MARY SUE HUBBARD, et al. :

ORDER

Upon consideration of the Motions for Modification and Clarification of this Court's February 17, 1982 Order; the Motion to Intervene filed by Times Publishing Company; the Church's Motion for a Protective Order; the oppositions thereto; the Memorandum Opinion issued this date; and the entire record herein, it is by the Court this 10th day of June, 1982,

ORDERED, that this Court's Memorandum Opinion and accompanying Orders issued in the above-captioned case on February 17, 1982 be and hereby are VACATED; and it is

FURTHER ORDERED, that the Motion to Intervene be and hereby is DENIED; and it is

FURTHER ORDERED, that the Motions for Modification of the February 17, 1982 Order be and hereby are GRANTED, in accordance with the Memorandum Opinion filed this date; and it is

FURTHER ORDERED, that the Church's Motion for a Protective Order be and hereby is DENIED; and it is

FURTHER ORDERED, that the Government's Motion for an Order Certifying a Copy of Document "FX" to the United States Tax Court be and hereby is GRANTED.

Aubrey E. Robinson, Jr.
United States District Judge

We recognize that there are arguments that Congress has, at some times and in some measure, tacitly approved part of these regulatory authorizations, but by no means directly, explicitly, or in the whole. We further recognize that the wisdom of the transfer procedures permitted by the regulations of the several agencies is a matter of high public financial policy, involving the financial interests not only of the parties before this court in these proceedings, but also of other large groups in the nation. It is the responsibility of the Congress and not the courts to determine such policy.

On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this court that the judgments of the district courts under review herein are reversed and the cases are remanded to the respective district courts with instructions to vacate and set aside the applicable portions of the following regulations:

(1) 43 Fed.Reg. 20,001 (1978) (to be codified in 12 C.F.R. § 217.5(c)(2) and (3)) of the Board of Governors of the Federal Reserve System;

(2) 43 Fed.Reg. 20,222 (1978) (to be codified in 12 C.F.R. § 329.5(c)(2)) of the Board of Directors of the Federal Deposit Insurance Corporation;

(3) 12 C.F.R. § 545.4–2 (1978) of the Federal Home Loan Bank Board; and

(4) 12 C.F.R. § 701.34 (1978) of the National Credit Union Administration; and it is

FURTHER ORDERED, by the Court, that the effectiveness of this Judgment, insofar as it directs that the subject regulations be vacated and set aside, is stayed until 1 January 1980 in the expectation that the Congress will declare its will upon these matters; and it is

FURTHER ORDERED, by the Court, that the Clerk is directed to enter copies of this Judgment in each of the captioned cases.

UNITED STATES of America

v.

Mary Sue HUBBARD, et al.

Appeal of CHURCH OF SCIENTOLOGY OF CALIFORNIA.

No. 82–1693.

United States Court of Appeals, District of Columbia Circuit.

Argued July 23, 1982.

Decided Aug. 10, 1982.

Appeal was taken in criminal cases from decisions of the United States District Court for the District of Columbia, Aubrey E. Robinson, Jr., J., with respect to motions seeking disclosure of documents seized from religious group. The Court of Appeals held that the District Court should not bring about disclosure of documents of religious group at request of Commissioner of Internal Revenue, defendant in tax court action in which group sought tax refund, or at request of party in pending lawsuits in federal district courts in Boston and Los Angeles, the decision to disclose or not to disclose should be made by tax court and such district courts and documents should remain sealed until they had been received in such courts.

Order accordingly.

MacKinnon, Circuit Judge, filed concurring opinion.

Criminal Law ⇐86

In criminal cases, district court in District of Columbia should not bring about disclosure of documents of religious group at request of Commissioner of Internal Revenue, defendant in tax court action in which group sought tax refund, or at request of party in pending lawsuits in federal district courts in Boston and Los Angeles, decision to disclose or not to disclose should

be made by tax court and such district courts and documents should remain sealed until they had been received in such courts.

Appeal from the United States District Court for the District of Columbia (D.C. Criminal No. 78–401).

Michael Lee Hertzberg of the Bar of the New York Court of Appeals, pro hac vice, by special leave of court, with whom Leonard B. Boudin, Eric M. Lieberman, New York City, and Roger C. Spaeder, Washington, D. C., were on the brief, for appellant.

Thomas Hoffman, Boston, Mass., of the Bar of the Supreme Judicial Court of Massachusetts, pro hac vice, by special leave of court, for petitioner-appellee Paulette Cooper.

Judith Hetherton, Asst. U. S. Atty., with whom Stanley S. Harris, U. S. Atty., and John A. Terry and Raymond Banoun, Asst. U. S. Attys., Washington, D. C., were on the brief, for appellee United States.

Before ROBINSON, Chief Judge, and MacKINNON and WALD, Circuit Judges.

Opinion PER CURIAM.

Concurring opinion filed by Circuit Judge MacKINNON.

PER CURIAM:

In 1977, following issuance of a very comprehensive search warrant, the United States Government seized several thousand documents from two Los Angeles premises of the Church of Scientology of California (Scientology). To aid in a criminal prosecution of several Scientologists, photocopies of a large subset of these documents were placed in the hands of the clerk of the United States District Court for the District of Columbia, under seal.[1] On the day before entering guilty verdicts on a stipulated record, the district court judge presiding over the criminal prosecutions of nine Scientologists unsealed the court's copies of all of these documents, except for certain ones whose originals had been returned to Scientology. Nine months later, we reversed, holding that the district court should release generally only those documents in which the public, or some member of the public, had a particularized interest sufficient to overcome Scientology's privacy interest. *United States v. Hubbard*, 650 F.2d 293 (D.C.Cir.1980).[2] On remand, a different district judge[2] found no particularized interests warranting disclosure. We therefore ordered all of the documents in the district court's possession resealed. *United States v. Hubbard*, 650 F.2d 293, 332–33 (D.C.Cir.1981) (supplemental opinion).

During the nine months between the district court's unsealing order and our reversal, the district court's copies of the documents were available for public inspection and photocopying.[3] Scientology asked us to recall and modify our mandate to seal the copies made during this nine-month period. We denied Scientology's motion in an unpublished order on January 19, 1982, mainly on the ground that it would be impractical to restrict third parties' use of their copies of the documents.[4]

We thus have made clear the status of two sets of copies of the seized documents: those in the district court's possession are

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1. *See generally United States v. Hubbard*, 650 F.2d 293, 296–99 & n.6 (D.C.Cir.1980).

2. The original trial judge had recused himself.

3. A motions panel of this court had denied a stay of the unsealing, the court en banc had denied reconsideration, and Chief Justice Burger, as Circuit Justice, had denied a stay.

4. The operative portion of our January 19 memorandum reads as follows:

> Recall and modification of a mandate is guided by equitable considerations. 7 J. Moore, Federal Practice ¶ 60.19. Recall and modification are limited to exceptional cases involving not just "good cause" and a need to prevent injustice but falling within one of several "special reason[s]." *See Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268, 275–80 (D.C.Cir.1971). This is not an exceptional case warranting the exercise of our power. Scientology fears that without additional protection from this court, private persons who have obtained copies of the documents while they were improperly unsealed will be free to use them as they please without judicial oversight of the kind involved in

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for the time being,[5] under seal; those in the possession of anyone but the district court, the government, and Scientology may be freely disseminated.[6] This appeal requires us to address for the first time[7] the status of a third set of the documents: the originals still in the government's hands. The district court concluded that the government's originals could be produced, without seal, to parties having a need for them. We believe a more moderate procedure will best accommodate the legitimate interests of the parties before us, as well as the various courts that must consider these documents. We therefore modify the district court's order.

I.

The Commissioner of Internal Revenue is defendant in an action in the Tax Court in which Scientology is seeking a tax refund, claiming it should be afforded tax-exempt status for 1970, 1971, and 1972. The Internal Revenue Service (IRS) wishes to use part of one of the seized documents ("Exhibit FX") in this litigation. The trial judge in the Tax Court, however, has declined to admit the document into evidence without some indication from a court in this jurisdiction that to do so would not violate *Hubbard*. The government thus moved in the district court on January 13, 1982 that Exhibit FX be "certified" to the Tax Court.[8]

Paulette Cooper is plaintiff in one tort action, and defendant in another, against Scientology. She has copies of several hundred of the seized documents, having made copies in the district court clerk's office

the course of ordinary discovery procedures. The additional protection sought is general, *i.e.*, requiring return of all copies, enjoining their future use, and making the sealing order effective *nunc pro tunc* back to the time of the improper unsealing. Scientology itself cautions that we ought not fashion a protective order deciding which documents are relevant to or discoverable in litigation in the various courts throughout the country. That caution is well taken; the various courts overseeing civil actions in which the documents are or may be involved are best able to oversee use of the copies made while the documents were improperly unsealed as well as to supervise discovery. Further, the general prohibition Scientology seeks here however would apply to unidentified non-litigants who acted in good faith in obtaining the documents and whose actions would now be governed by an order they had no meaningful opportunity to contest. Any such general prohibition would not only extend the court's mandate to unknowable limits but would realistically be unenforceable as well.
See also infra note 6.

5. Both Scientology and the government indicated at oral argument that they expect at some point in the future to file motions to change the status of the court's copies. We note that many circumstances have already changed since we filed the *Hubbard* opinions in 1980 and 1981—the seizure of the documents has been upheld against a fourth amendment attack, criminal convictions have been obtained and affirmed, and the Supreme Court has denied certiorari with respect to all but two of the defendants. *See generally United States v. Heldt*, 668 F.2d 1238 (D.C.Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982). We do not, of course, decide whether these changed circumstances would justify a general unsealing of the documents at this time, for neither the district court nor this court has been presented with a motion for such unsealing.

6. Scientology makes an argument that some people who copied the district court's documents during their period of availability may not have done so "in good faith" and are therefore outside the scope of our January 19 memorandum. *See supra* note 4. We disagree. Anyone who wished to copy the documents during those nine months was totally free to do so; "bad faith" in this context is a meaningless term. Nonlitigants (if the criminal case below) who copied these documents are subject only to the oversight of "courts overseeing civil actions in which the documents are or may be involved." *Id.*

7. The oral argument in this appeal made clear that no one contends that our *Hubbard* opinions addressed in terms the government's originals. Scientology contends only that those opinions have logical implications for the government's originals.

8. The IRS has apparently long been in possession of Exhibit FX, having obtained copies both from the United States Attorney or Federal Bureau of Investigation (FBI) for law-enforcement purposes, and from the district court during the nine-month period of unsealing. The government's January 13 motion in the district court, therefore, pertained not to actual release of anyone's copy of Exhibit FX, but to the Tax Court's *use* of the document.

during the unsealed period. She wishes to use these documents in her pending lawsuits, one in federal district court in Boston, the other in federal district court in Los Angeles. She sought through ordinary discovery to have Scientology confirm the authenticity of the documents in her possession, but Scientology would only admit that they were true copies of the documents *returned* to it by the FBI, suggesting that they might differ in some way from the originals *seized* from Scientology. Ms. Cooper therefore sought to depose the custodian of the original seized documents so that she could authenticate her copies. She served a subpoena duces tecum on the United States. The United States, in accord with a disposition agreement entered into with the criminal defendants,[9] provided Scientology with ten days' notice of its intention to comply with the subpoena, and Scientology promptly sought from the district court here a protective order prohibiting disclosure of these documents, or the deposition transcript, to the public.

On February 17, 1982, the district court ruled on the IRS' motion and Scientology's motion. In a thoughtful analysis of our *Hubbard* opinion, the court held

> that the original seized documents now in the hands of the government, as well as all copies of the documents obtained by individuals during the nine month unsealing, fall within the scope of the sealing order placed on the documents by the Court of Appeals' decision in *United States v. Hubbard*, 650 F.2d 293 (D.C.Cir. 1980). These documents, although not physically located within the confines of the United States Courthouse, are nevertheless under seal and may not be disseminated without first securing from this Court an unsealing order specifically permitting such dissemination. This is true whether the proposed dissemination would result in "wholesale public access" to the documents or in a more limited disclosure of the documents.

Memorandum opinion at 5–6. The court went on to hold, however, that both the IRS and Ms. Cooper had a particular need for the documents, so that certification of Exhibit FX and Ms. Cooper's deposition, with its accompanying documents, could go forward, so long as Exhibit FX and the deposition transcript were placed under seal in the courts in which they were to be used.[10] *Id.* at 7–10.

Scientology neither sought reconsideration of nor took an appeal from the February 17 ruling. The government, however, sought reconsideration and modification of the opinion and order, and Ms. Cooper sought "clarification." [11] In its twenty-two-page motion, the government complained at length that the February 17 decision had the effect of retroactively making illegal numerous disseminations of the documents that had already taken place within the federal government. In a single paragraph, the government also argued that there was no need for a seal on the Tax Court document because of the "strong public policy in favor of full disclosure of evidence upon which a court relies in rendering its decisions." R. 948 at 21 (citing *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1977); *Hubbard*, 650 F.2d at 317–18 & n.96).[12] Ms. Cooper

9. The disposition agreement is discussed briefly in *Hubbard*, 650 F.2d at 300–01, and reprinted in full in *United States v. Heldt*, 668 F.2d 1238, 1286–88 (D.C.Cir.1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982). The relevant paragraph, number 8, is reprinted in *id.* at 1287. Scientology was not a party to the disposition agreement, and we held in *Hubbard*, 650 F.2d at 319–20, that its interests are distinct from those of the individual criminal defendants. Scientology is, however, a third-party beneficiary of the disposition agreement in this context.

10. We understand the district court's finding that Ms. Cooper and the IRS had a need for these documents to be undisputed. In any event, it is indisputable.

11. Times Publishing Company, a publisher of two Florida newspapers, also sought to intervene and to have the district court modify its order. The district court denied intervention, and Times Publishing Company has not appealed.

12. "R." refers to the numbered documents in the district court record.

attached to her motion copies of three letters in which counsel for Scientology or Scientologists had advised Ms. Cooper and others that the February 17 opinion required that they not disseminate their copies of the documents, and further that they withdraw the copies attached to their pleadings in pending litigation. Ms. Cooper's motion argued that this was an unconstitutional prior restraint on free speech and that these documents were already in the public domain. R. 949. Both the government and Ms. Cooper also relied heavily on our January 19 memorandum, *see supra* note 4, which for some reason had not come to the attention of the district judge when he ruled on February 17.[13]

In another thoughtful opinion, the district judge on June 10 vacated his February 17 order. In light of our January 19 memorandum, he held that "when the Court of Appeals imposed the seal in *United States v. Hubbard, supra*, it intended to seal only those documents actually located in the court files." Memorandum opinion at 4. He therefore removed all restrictions on government dissemination except those found in the disposition agreement, *see supra* p. 958 & note 9, removed all restrictions on private party dissemination, and ordered that the certification of Exhibit FX and Ms. Cooper's depositions go forward without the seals previously imposed.

Scientology appealed this ruling and sought a stay pending appeal from the district court. The district court denied a stay, and Scientology then sought an emergency stay from this court. We granted a temporary stay on July 14 and on July 20 ordered that all briefing of the entire appeal be completed by July 22 and that oral argument take place on July 23.[14] We now decide the full appeal.

II.

In our opinion, this case presents exceedingly narrow issues. We need only decide whether the district court *in the District of Columbia* should bring about public disclosure, *at the request of these parties*, of the particular documents at issue in this litigation. We believe it should not at this time. The government's interest in certification of Exhibit FX to the Tax Court is legitimate. Certification of Exhibit FX under seal fully satisfies that interest. The further interest asserted by the government—public disclosure of evidence *upon which a court relies*—may be satisfied by public disclosure when and if the Tax Court in fact relies on Exhibit FX. A Tax Court decision *to disclose or not to disclose* Exhibit FX will contravene neither the letter nor the spirit of our *Hubbard* decision and our January 19 memorandum. In short, the government's predisclosure arguments and Scientology's antidisclosure arguments should be addressed to the Tax Court judge. Our function is simply to assure the Tax Court freedom to rule as it sees fit by ordering the government's copy of Exhibit FX kept under seal unless and until the Tax Court rules otherwise. In this connection it may exercise its sound judicial discretion. It is not bound by the seal of the district court.

Similarly, Ms. Cooper's interest in authentication of her documents is legitimate.[15] This interest is protected by taking the deposition and placing it under seal. As counsel for Ms. Cooper admitted at oral argument, his client has no interest in further dissemination. There may be others who have an interest in obtaining access to

13. The record sheds no light on why this was so. It appears there may have been some inadvertent breakdown in communications between our clerk's office and the parties.

14. No one objected to this schedule.

15. Scientology has raised a question as to whether copies of the documents produced by the subpoena duces tecum may be attached to the transcripts of the deposition taken by Ms. Cooper, or whether instead the FBI agent producing them may only testify as to his visual comparison of the originals and Ms. Cooper's copies. We think it clear that copies of the documents may be attached, in furtherance of Ms. Cooper's legitimate interest. Whether nothing, the transcript without attachments, or the transcript with attachments is made public is a matter for determination by the courts in which the transcript is used.

the transcript of the deposition, but they were not before the district court and are not before us. Furthermore, should they eventually appear, their arguments should not be addressed to us or to the district court here, but to the courts in which the deposition transcript will be used. Our jurisdiction, it should be obvious, does not extend to Boston or Los Angeles; we cannot, should not, and do not restrict the district courts in those places from unsealing the deposition transcript, or portions thereof, in accord with the usual principles governing public access to the fruits of discovery,[16] and documents in the record of court proceedings. Our jurisdiction does, of course, extend to the district court here, and we hold that that court should have recognized the Boston and Los Angeles courts' freedom to rule by ordering the deposition transcript kept under seal unless and until they rule otherwise.

We therefore hold that the seal on Exhibit FX and the deposition transcript is retained until they have been received in the courts in which they are to be used. Those courts may then rule on the status of such documents as they consider proper. Two other points require brief elaboration. We affirm the district court's June 10 order insofar as it removes restrictions on third-party dissemination of the documents obtained during the unsealing period. The June 10 order in this respect comports fully with our January 19 memorandum. *See also supra* note 6. Also, we affirm the June 10 order insofar as it removes any retroactive invalidation of intragovernmental dissemination of those documents. No matter how broadly or narrowly our *Hubbard* opinion is read, it certainly allows dissemination by the government "to appropriate law enforcement agencies." *Hubbard*, 650 F.2d at 323.[17] The record reflects that the government has done no more than give copies of the documents to such agencies.[18]

III.

We remand this case to the district court. The district court shall modify its June 10 order to require that Exhibit FX be kept under seal unless and until the Tax Court orders otherwise. The district court shall also modify its order to require that the transcript of the deposition taken by Paulette Cooper of FBI Agent Varley be transmitted under seal to the United States District Courts for the District of Massachusetts and for the Central District of California. Once the transcript is in the possession of those courts, they may rule on its status. In all other respects, the district court is affirmed.

So ordered.

MacKINNON, Circuit Judge (concurring).

I concur generally in the foregoing opinion but desire to comment additionally. At oral argument appellant's counsel stated they were proceeding on the theory that they could eventually obtain the return of *all* the original evidentiary documents seized from the Church of Scientology (Scientology) which were introduced as exhibits in the case. Implicit in this theory as advanced was the assumption that the Government would also surrender all copies of the exhibits. If the theory of Scientology eventuated, the evidentiary record in this case would end up devoid of reliable substantiation. Scientology's theory cannot

16. These principles, of course, largely depend on a balancing similar to that we undertook in *Hubbard*, and these courts may well look to our *Hubbard* opinion (with due regard to changed circumstances, *see supra* note 5) for guidance. They are, however, clearly not *bound* by our *Hubbard* opinion.

17. In *Hubbard* we said that the *district court* could make copies available to such agencies. Counsel for Scientology, however, does not contend that the government is more restricted in this regard.

18. "[A]ppropriate law enforcement agencies," as we used that term in *Hubbard*, encompasses agencies charged with enforcing *both* the criminal and civil laws (including internal revenue laws). The public has a strong interest in the enforcement of both. *Cf. Hubbard*, 650 F.2d at 323 ("[A]ccess might be ... warranted where the remedies of grievously injured and unknowing victims would be jeopardized if the documents never entered the public domain").

prevail. The court must at all times retain a complete and authoritative record.

It was further claimed at oral argument that our decision in *United States v. Wilson*, 540 F.2d 1100 (D.C.Cir.1976), supports Scientology's position. Having authored *Wilson*, which is apparently the leading case, I believe it worthwhile to correct some misconceptions. We held in *Wilson* that a federal district court possesses both the jurisdiction and duty "in a criminal case to return to the defendant that property seized from him in the investigation but which is not alleged to be stolen, contraband, or otherwise forfeitable, and which is not needed, or is no longer needed, as evidence." *Id.* at 1101. *Wilson* involved money, whereas here we are dealing with corporate records and documents. There was no intent in *Wilson* to deal with other property. Money, to which the Government has no further claim, is usually properly returned to a defendant when the case is over and its evidentiary value, if any, has been exhausted.

Corporate records and documents, however, are of a different character and involve some different considerations. Generally when corporate business records are admitted into evidence, if they are *needed* by the corporation for its operations, copies are furnished and the practice is for the court to exercise its discretion to allow the return of the originals to the corporation. The originals need not be returned, however, if they are needed by the court. After the case is finally completed the court may, in its discretion, permit the substitution of copies for the originals. It is important that the court's evidentiary record at all times be complete and authoritative. This is particularly important in criminal cases where some defendants attempt to attack their convictions many years after they became final; an authoritative evidentiary record may be required to resolve issues.

Courts may also allow the government to retain seized documents and other property not used at trial for investigations relating to other possible criminal actions. Such was the conclusion of the Sixth Circuit in *United States v. Murphy*, 413 F.2d 1129 (6th Cir.), *cert. denied*, 396 U.S. 896, 90 S.Ct. 195, 24 L.Ed.2d 174 (1969), where it stated:

> The main point of appellants' argument in this regard was that they had the right to the return of other property and documents which were seized by the Government at the time of their arrest and were not exhibits in the case. This property and the other documents were being held so that it could be determined whether they were stolen from other institutions, and could be used as exhibits in numerous subsequent actions commenced against appellant in different parts of the country. But the withholding of this property from appellants resulted in no error or prejudice to them in this case.

Id. at 1140. The reasoning of the Sixth Circuit appears to have particular relevance here where additional criminal and civil actions have either been commenced or may yet be instituted. Amidst the prospect or actuality of subsequent litigation the *integrity* of seized documents that were admitted into evidence in an earlier proceeding must be preserved against the contention that any copies are not true and correct. Appellant here has already claimed that copies of some documents are not correct copies of documents seized pursuant to the search warrant. Under such circumstances the court in its discretion might decide to retain the originals if appellants are unable to show a *legitimate* business need for them. It is difficult to imagine what legitimate business need appellants could show for the documents in question because they are not ordinary business records but were seized because of their relevance to certain criminal offenses which have resulted in convictions and sentences. It may be that appellants are attempting to obstruct plaintiffs from obtaining evidence necessary for some civil actions that are pending or might be brought against Scientology or its officials.[1]

The disposition to be made of evidentiary documents lies within the sound discretion of the trial court which should be alert to

1. Counsel for Intervenor-Appellee Paulette Cooper at oral argument mentioned his efforts to authenticate some of the documents that are relevant to her pending civil litigation with

preserve an accurate and complete evidentiary record covering all proceedings and exhibits.

As the Third Circuit held in *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297 (3d Cir. 1978), a district court's determination of the reasonableness of the retention of property should include "consideration of the purposes for which the property is being held." *Id.* at 1304. The Third Circuit further admonished that district courts should be "sensitive to the need to balance the owner's interests and the often complex and varied governmental interests in retaining evidence for trial." *Id.* The retention of an authentic record should also figure in this equation. Only if the Government's retention is unreasonable in light of all the circumstances should the district court order the return of the seized property.

Ervin SZEWCZUGA and Gerald Treichel, Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

MILLER BREWING COMPANY, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent.

Nos. 81-1054, 81-1413.

United States Court of Appeals, District of Columbia Circuit.

Argued Feb. 12, 1982.

Decided Aug. 17, 1982.

Employer petitioned for review of an order of the National Labor Relations Board and the Board cross petitioned for enforcement of its order. In addition, union stewards who had been discharged for their participation in an unauthorized strike challenged the remedy. The Court of Appeals, McGowan, Senior Circuit Judge, held that the employer could not impose a more harsh punishment on union stewards who engaged in unprotected strike where the stewards were not leaders of the strike and the collective bargaining process did not explicitly create higher duties for union stewards and, further, the remedy could be limited to back pay for that period of time for which the stewards were subjected to greater punishment than rank-and-file union members.

Order enforced.

1. Labor Relations ⇐563

Substantial evidence supported conclusion of National Labor Relations Board that two union stewards were not strike leaders and, therefore, stewards could not be discharged for participating in unauthorized strike when other striking employees were suspended.

2. Labor Relations ⇐376

Officials of employer did not have good-faith belief that union stewards were leaders of unauthorized strike and could not justify discharge of union stewards, when other striking employees were suspended on that basis.

3. Labor Relations ⇐368

Although union officials may be punished more harshly for their conduct in violation of no-strike clause where collective bargaining process has imposed higher duties upon union officials than rank-and-file, "neutral" or "general" no-strike clause which imposes no higher duty on union officials does not authorize harsher punishment

Scientology. Cooper should also consider whether such authentication might be accomplished by (1) the inventory of the search that was filed with the court and (2) by any additional notes or memoranda that the Government may have made contemporaneously with the search.

made by appellants would amount to approximately $25,000,000 with respect to Michigan shareholders. If this Court were to permit the Cease and Desist Order to remain in effect, Michigan residents might well be denied the opportunity to tender their shares and receive cash and thus might well be placed at a disadvantage as compared to shareholders in other states.

The judgment of the District Court is reversed and the action is remanded to the District Court for entry of a preliminary injunction in the form of the preliminary injunction entered concurrent herewith, and for further proceedings consistent with this opinion.

SOVEREIGN NEWS CO.,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 80-3197.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 15, 1981.

Decided Oct. 6, 1982.

Rehearing Denied Nov. 3, 1982.

Rehearing and Rehearing En Banc Denied Jan. 11, 1983.

Plaintiff appealed from an order of the United States District Court for the Northern District of Ohio, William K. Thomas, J., denying its motion for the return of copies of property seized during an obscenity investigation. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that: (1) the District Court's decision was a final appealable order; (2) the search warrant was not invalid due to a factual misstatement by the magistrate; (3) the taking of notes concerning other evidence by the government agents during the search and seizure did not constitute an illegal seizure; (4) there was probable cause for the second search warrant; and (5) when the Government had held the copies of plaintiff's business records for a "reasonable time" and had no investigations in progress, it had to return the copies as well as the originals.

Affirmed and remanded.

1. Criminal Law ⇐1128(4)

A party may not bypass fact-finding process of lower court and introduce new facts in its brief on appeal.

2. Criminal Law ⇐1023(3)

A criminal prosecution must be "in being" to render a motion for return of evidence interlocutory; a criminal prosecution is not "in being" if it is still in the investigatory stage. Fed.Rules Cr.Proc. Rule 41(e), 18 U.S.C.A.

3. Criminal Law ⇐1023(2)

District Court's order denying plaintiff's motion for the return of copies of property seized during an obscenity investigation was a final appealable order despite Government's claim that the business records in question were relevant to an ongoing criminal tax investigation, where no indictment had been issued and no charges were filed in any tax proceeding, in that the mere possibility of a prosecution was too remote to deprive the order of finality. Fed.Rules Cr.Proc. Rule 41(e), 18 U.S.C.A.

4. Searches and Seizures ⇐3.4

Search warrant which authorized seizure of films and magazines was not invalid due to a factual misstatement on face of the warrant, due to magistrate's personal examination of the target materials, or due to any bias on magistrate's part. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐3.8(1)

Taking of notes by government agents during search and seizure of films and magazines did not constitute an illegal search and seizure where the notes concerned objects related to the search in progress and

the objects were in plain view and were discovered inadvertently. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇐3.6(5)

Conclusions alone are insufficient to support a warrant for seizure of allegedly obscene materials, as are descriptions of only the titles or covers of the materials; rather, magistrate's decision must rest upon a consideration of contents of the work as a whole.

7. Searches and Seizures ⇐3.6(5)

Probable cause existed for issuance of warrant authorizing search and seizure of allegedly obscene films and magazines even though underlying affidavit provided only titles and descriptions of the materials' covers where the same magistrate had issued warrant only seven days earlier at request of the same agent who was conducting the same investigation, second affidavit recounted both the first search and nature of the items collected, and affidavit then provided a list of materials whose titles and covers strongly suggested that they were of the same variety as those already seized. U.S.C.A.Const.Amend. 4.

8. Searches and Seizures ⇐3.7

Warrant which authorized search and seizure of allegedly obscene films and magazines was not invalid due to facial overbroadness because of phrase which authorized seizure of "other magazines and movies of the same kind and nature" where government agent seized only magazines and movies listed in the exhibit attached to the warrant. U.S.C.A.Const.Amend. 4.

9. Searches and Seizures ⇐3.7

Where police and issuing magistrate have listed titles of primary targets of a search, Court of Appeals will not invalidate the entire warrant due to facial overbroadness; rather, Court will sever and invalidate portion containing the overbroad language and allow items seized under the proper section to stand as evidence. U.S.C.A.Const.Amend. 4.

10. Searches and Seizures ⇐3.7

Magistrate was entitled to describe business records generically in warrant which authorized search and seizure of allegedly obscene films and magazines, along with business records, since any greater specificity with regard to items was virtually impossible. U.S.C.A.Const.Amend. 4.

11. Searches and Seizures ⇐5

Where former defendant in criminal proceedings can show a property interest in copies of seized documents, the government must return them. Fed.Rules Cr.Proc. Rule 41(e), 18 U.S.C.A.

12. Searches and Seizures ⇐5

Plaintiff had a property interest in copies of business records seized in obscenity investigation since business records copied were sole property of plaintiff, but plaintiff's right to return of the copies had to be balanced against legitimate needs of the United States; therefore, when Government had held copies for a "reasonable time" and had no investigations in progress, it had to return the copies as well as the originals. Fed.Rules Cr.Proc. Rule 41(e), 18 U.S.C.A.

Bernard Berkman (argued), Cleveland, Ohio, for plaintiff-appellant.

Steven Olah, U.S. Dept. of Justice, Cleveland, Ohio, Patty Merkamp Stemler (argued), U.S. Dept. of Justice, Appellate Section, Criminal Div., Washington, D.C., for defendant-appellee.

Before MERRITT and MARTIN, Circuit Judges, and PHILLIPS, Senior Circuit Judge.

BOYCE F. MARTIN, Jr., Circuit Judge.

The Sovereign News Company appeals an order denying a motion for the return of copies of property seized during an obscenity investigation. The United States seized certain films, books, and business records during the investigation which culminated in a 1978 trial and acquittal. After the trial, the government returned all original evidence, but retained copies of the business

records. Sovereign News then filed this motion under Fed.R.Crim.P. 41(e), claiming that the government must also return the copies because the originals were illegally seized. In 1976, while the obscenity proceedings were pending, Sovereign News filed a similar motion relating to the original evidence. This court held that it did not have jurisdiction to hear the 1976 motion because of the ongoing obscenity prosecution. *Sovereign News Company v. United States*, 544 F.2d 909 (6th Cir. 1976) (per curiam), *cert. denied*, 434 U.S. 817, 98 S.Ct. 55, 54 L.Ed.2d 73 (1977). In the present matter, the United States urges us to reach a similar holding of "no jurisdiction" because the government claims the business records in question are now relevant to an ongoing criminal tax investigation.

Sovereign News, on the other hand, contends that the government obtained the business records as the result of two illegal searches on March 19 and 25, 1975, made in reliance on invalid search warrants.

Both parties' arguments are without merit. We assert jurisdiction over the appeal and affirm the decision of the District Court. However, we hold that when the government has no further legitimate use for the records, it must return the copies as well as the originals.

I. Jurisdiction

The government bases its jurisdictional argument on our decision in the first *Sovereign News* case and *DiBella v. United States*, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962). In *DiBella*, the Supreme Court held that the denial of a motion for the return of property is appealable only if it is not tied to a criminal prosecution *in esse*, *i.e.*, in progress. 369 U.S. at 131–32, 82 S.Ct. at 660. However, if a prosecution is in progress, "[the 41(e) motion] shall be treated also as a motion to suppress under Rule 12." Fed.R.Crim.P. 41(e). Motions to suppress evidence are "truly interlocutory" and not appealable. *DiBella v. United States*, 369 U.S. at 131, 82 S.Ct. at 660. *Cogen v. United States*, 278 U.S. 221, 49 S.Ct. 118, 73 L.Ed. 275 (1929). The government contends that since a grand jury allegedly has been empanelled to hear the results of the tax investigation, we must apply the *DiBella* rule again. We disagree.

[1, 2] The government admits that it did not raise this question before the District Court and that the issue does not appear on the record. A party may not by-pass the fact-finding process of the lower court and introduce new facts in its brief on appeal. *Richardson v. Blanton*, 597 F.2d 1078, 1079 (6th Cir. 1979), *cert. denied*, 444 U.S. 886, 100 S.Ct. 180, 62 L.Ed.2d 117 (1979). Therefore, we decline to exercise any discretion we might have under the "plain error" doctrine. Fed.R.Crim.P. 52(b). Fed.R.App.P. 10(e). *United States v. Bowling*, 351 F.2d 236, 241 (6th Cir. 1965), *cert. denied*, 383 U.S. 908, 86 S.Ct. 888, 15 L.Ed.2d 663 (1966). Additionally, the criminal prosecution must be "in being" to render a 41(b) motion interlocutory. A criminal prosecution is not "in being" if it is still in the investigatory stage. *Mr. Lucky Messenger Service, Inc. v. United States*, 587 F.2d 15, 16 (7th Cir. 1978).

[3] Because no indictment has been issued and no charges have been filed in any tax proceeding, the District Court's decision is a final appealable order. While we do not establish any hard and fast rule for determining when a criminal prosecution becomes "in being" for purposes of the *DiBella* rule, we find that the mere possibility of a prosecution is too remote "to deprive the district court's order of finality." *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d 1297, 1301 (3d Cir. 1978). In the present case, the government seized appellant's business records in 1975 for an obscenity investigation which ended in 1978. It is now 1982. We will not permit the government to characterize the present appeal as "interlocutory" because the same evidence may or may not be relevant to a completely different investigation. In so doing, we would postpone appellant's access to appellate review indefinitely. We do not interpret *DiBella* to require such a result. *United States v. Premises Known as 608 Taylor Ave.*, 584 F.2d at 1301. *See also Hunsucker v. Phinney*, 497 F.2d 29 (5th Cir.

1974), *cert. denied,* 420 U.S. 927, 95 S.Ct. 1124, 43 L.Ed.2d 397 (1975); *Richey v. Smith,* 515 F.2d 1239 (5th Cir. 1975).

II. The Searches

A. The First Search

The government conducted the first search on March 19, 1975. Sovereign News challenges the validity of that search on two grounds. First, it contends that the search warrant was invalid because of a misrepresentation by the issuing magistrate. Second, Sovereign News contends that the government agents committed a separate illegal seizure by taking notes of other evidence unrelated to the items listed in the search warrant.

On March 14, FBI Agent George Grotz presented ten films and several stacks of magazines to Magistrate Herbert T. Maher. Magistrate Maher viewed between three and five of the films in their entirety. He then viewed selected sections of other films by holding them up to a light to determine if they were similar to the other films. Finally, he examined the contents of the top magazine in each stack before him.

On March 18, Grotz and United States Postal Inspector Ronald Baranowski appeared before Maher seeking a search warrant for the premises of Sovereign News. In support of the warrant, Grotz and Baranowski submitted an affidavit which listed the titles of the ten films and forty-nine magazines which Grotz and Baranowski described as obscene and believed to be in Sovereign News' warehouse. The affidavit stated that, based on information received from a confidential informant, federal agents in Texas had intercepted these films and magazines in packages mailed by Sovereign News in Cleveland to an "adult bookstore" in Fort Worth. The affidavit stated that Agent Grotz had reviewed the contents of all the items listed and described those contents as depicting "acts of sexual intercourse, fallatio [sic], cunnilingus, analingus, ejaculation and masturbation." The remainder of the thirty-three-page affidavit detailed the facts and circumstances supporting the belief that the Sovereign News Company was engaged in the interstate transportation of similar magazines and films.

[4] On the basis of the affidavit and his own examination, Magistrate Maher issued a search warrant which authorized the seizure of three evidentiary copies of each of the ten films and forty-nine magazines named in the affidavit. The magistrate attached the affidavit to the warrant as Exhibit B and attached a list of the films and magazines as Exhibit A. The warrant also authorized the seizure of "records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories and other documents reflecting the importation, receipt, and shipment of the aforementioned obscene material in interstate commerce or by the U.S. Postal Service." In the space reserved for the "facts tending to establish the foregoing grounds for issuance of a Search Warrant," Magistrate Maher first listed "See attached affidavit: Exhibit B." He then added that "[o]n March 14, 1975, U.S. Magistrate Herbert T. Maher was presented with and did examine copies of the magazines and motion picture films listed in Exhibit A."

Sovereign News argues that this misstatement on the face of the warrant invalidated the warrant under *Franks v. Delaware,* 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). In *Franks,* the Supreme Court held that a defendant could challenge the veracity of a warrant affidavit. *Id.* at 165, 98 S.Ct. at 2681. The Court sought to avoid deception of the magistrate by the affiant. The danger of deception does not exist here. Sovereign News does not contend that the affidavit was false or misleading in any way. Therefore, *Franks,* which concerns false affidavits, does not control the instant case.

Furthermore, Magistrate Maher went beyond the law's requirements by personally examining the target materials. He could have issued the warrant on the basis of the affidavit alone. Instead, he investigated a representative sample of the materials presented to him. *United States v. Espino-*

za, 641 F.2d 153, 162–64 (4th Cir. 1981), *cert. denied,* 454 U.S. 841, 102 S.Ct. 153, 70 L.Ed.2d 125 (1981); *United States v. Thomas,* 613 F.2d 787, 790 (10th Cir.), *cert. denied,* 449 U.S. 888, 101 S.Ct. 245, 66 L.Ed.2d 114 (1980). *United States v. Middleton,* 599 F.2d 1349 (5th Cir. 1979). In this case, as in *Middleton,* the affidavit "related these passages in graphic detail, thereby enabling the magistrate 'to focus searchingly on the question of obscenity.'" 599 F.2d at 1359. Magistrate Maher's action was a good faith effort to protect the appellant's rights. His statement on the warrant did not compromise the validity of the information he had received and was at worst a superfluous technical error. We will not penalize the law enforcement authorities by overturning this otherwise valid warrant. *United States v. Ventresca,* 380 U.S. 102, 109, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965).

Sovereign News also argues that Magistrate Maher's misstatement evidenced bias on his part and, therefore, makes the warrant invalid under *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 99 S.Ct. 2319, 60 L.Ed.2d 920 (1979). In *Lo-Ji,* the magistrate issued an essentially blank search warrant which he completed after accompanying the police on their search of an adult bookstore. As a result, the magistrate became a member of the investigating unit. That is not the case here. Magistrate Maher's statement is insufficient to destroy his status as a "neutral and detached magistrate." *Coolidge v. New Hampshire,* 403 U.S. 443, 449–53, 91 S.Ct. 2022, 2029–31, 29 L.Ed.2d 564 (1971).

[5] Appellant next argues that the taking of notes by the agents constitutes an illegal search and seizure. In support of this argument, Sovereign News cites this court's decision in *United States v. Gray,* 484 F.2d 352 (6th Cir. 1973), *cert. denied,* 414 U.S. 1158, 94 S.Ct. 916, 39 L.Ed.2d 110 (1974). The *Gray* case involved the search of a house for evidence of a "moonshine" operation. During the search, the officers saw several rifles in the suspect's closet. They removed the rifles to another room and copied the serial numbers. A trace of the numbers revealed the rifles to be stolen property. We reversed the defendant's conviction for violation of firearms statutes, 18 U.S.C. §§ 922(h)(1) and 922(j), because the officers had "seized" the rifles which were not listed in the search warrant. "[T]here was no nexus between the rifles and the crimes of selling or possessing intoxicating liquor without a license; nor did the officers have knowledge that the rifles were evidence of any other crime." 484 F.2d at 355. The police may not seize "one thing under a warrant describing another." *Marron v. United States,* 275 U.S. 192, 196, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927).

However, in this case, there is an obvious nexus between the items "seized" by the officer's notation and the focus of the search warrant. The officers who searched the premises of Sovereign News did not open boxes containing materials not listed in the warrant nor did they peer into areas which could not have contained the specified items. The officers noted the titles of films and magazines which were in plain view during the course of their search. In addition, they took note of other business records. The government used these notes to prepare a second search warrant. The information related to the warrant being executed and was gathered in an unobtrusive manner. Thus, the facts meet the primary requirements of the "plain view" doctrine. Briefly, those requirements are: (a) the officer must be lawfully on the premises; (b) the incriminating nature of the evidence seized must be immediately apparent; and (c) the discovery must be inadvertent. *See Coolidge v. New Hampshire,* 403 U.S. at 465–71, 91 S.Ct. at 2037–40.

The facts here also fit *United States v. Espinoza.* In *Espinoza,* agents photographed the defendant's office and warehouse during an obscenity investigation. The court excused the "seizure" of the agent's "mental images" under the plain view exception. The photographer was lawfully present on the premises; the images were evidence of criminal activity; and the evidence was found inadvertently. *United States v. Espinoza,* 641 F.2d at 166–67.

Appellant argues that the "seizure" by note-taking was neither inadvertent nor properly limited to evidence whose incriminating nature was immediately apparent. Neither argument is persuasive. First, the fact that the officers expected to find non-listed, obscene materials during the warrant's execution does not rule out inadvertence.

> There are many times when a police officer may "expect" to find evidence in a particular place, and that expectation may range from a weak hunch to a strong suspicion. However, the Fourth Amendment prohibits either a warrant to issue or a search based on such an expectation. Yet if in the course of an intrusion wholly authorized by another legitimate purpose, that hunch or suspicion is confirmed by an actual observation, the police are in precisely the same position as if they were taken wholly by surprise by the discovery.

United States v. Hare, 589 F.2d 1291, 1294 (6th Cir. 1979). Second, the affidavit submitted for the second warrant described the outside appearance of the noted materials in graphic detail. This description was sufficient to justify noting the materials as possible evidence of criminal activity directly related to the activity under investigation.

We conclude that the note-taking in the present case was not an illegal seizure. The notes concerned objects related to the search in progress; the objects were in plain view and the objects were discovered inadvertently.

B. The Second Search

On March 25, Agent Grotz returned to Magistrate Maher to obtain a warrant for another search of Sovereign News' premises. Grotz submitted an affidavit which reviewed the results of the first search and listed the magazines and films observed but not seized. The affidavit noted that certain magazines were seen "in plain view" and stated that the magazine covers "vividly depicted obscene sexual activities between males and females, males and males, females and females, including acts of fellatio, cunnilingus, and ejaculation, of the same kind which were seized pursuant to the aforementioned search warrant." In addition, the affidavit stated that numerous boxes of eight millimeter films were observed "in plain view" and that the covers of the boxes "also depicted obscene sexual activities between males and females, males and males, females and females, which included obscene sexual acts of fellatio, cunnilingus and ejaculation and masturbation." The affidavit then listed the titles of the magazines and films which were seen in plain view. Furthermore, the affidavit listed certain business records observed during the search "reflecting the ongoing interstate shipments of obscene material." Finally, the affidavit described an FBI investigation concerning a recent shipment of obscene magazines from a company in San Fernando, California, to Sovereign News.

After examining the affidavit, Magistrate Maher issued the requested warrant. The warrant authorized the seizure of three evidentiary copies of each of the listed films and magazines as well as "other magazines and movies of the same kind and nature." The warrant also authorized the seizure of "records, receipts, notations, bills of lading, journals, ledgers, billing invoices, inventories, and other documents reflecting the importation, receipt, and shipment" of seizable publications as well as "documents reflecting the corporate structure of Sovereign News Company and any of its affiliate companies."

Sovereign News attacks the warrant on the grounds that (1) there was not enough probable cause shown and that (2) the warrant was impermissibly broad. Again, we do not agree.

First, Sovereign News argues that *Marcus v. Search Warrant,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), invalidates the warrant in question. In *Marcus,* the Supreme Court invalidated a warrant based "on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene." 367 U.S. at 731–32, 81 S.Ct. at

1715–16. The *Marcus* warrant did not contain either a list or a specific description of the publications to be seized. Rather, the warrant allowed the officers to make "ad hoc decisions" with complete discretion. 367 U.S. at 732, 81 S.Ct. at 1716.

Appellant also relies upon *Lee Art Theatre v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968), in which the Supreme Court invalidated a warrant which stated only the title of the pictures and "that the officer had determined from personal observation of them and of the billboard in front of the theatre that the films were obscene." 392 U.S. at 636, 88 S.Ct. at 2104. The Court invalidated the warrant because the justice of the peace issued the warrant "solely upon the conclusory assertions of the police officer" and "without any inquiry ... into the factual basis for the officer's conclusions." 392 U.S. at 637, 88 S.Ct. at 2104.

[6] Conclusions alone are insufficient to support a warrant, as are descriptions of only the titles or covers of the materials. *See, e.g., United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977). The magistrate's decision must rest upon a consideration of the contents of the work as a whole. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Since the underlying affidavit, in the present case, provided only the titles and descriptions of the materials covers, the second warrant, when viewed alone, would fail the constitutional test.

[7] However, we cannot view the second warrant in a vacuum. The Supreme Court stated that "affidavits for search warrants ... must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). The same magistrate issued both warrants only seven days apart at the request of the same agent who was conducting the same investigation. The second affidavit recounted both the first search and the nature of the items collected. The affidavit then provided a list of materials whose titles and covers strongly suggested that they were of the same variety as those already seized. This court has allowed probable cause to be established by reading related affidavits in conjunction with one another. *United States v. Manufacturers National Bank of Detroit*, 536 F.2d 699 (6th Cir. 1976), *cert. denied*, 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 749 (1977).

> The October 7th affidavit did not contain the detailed information concerning the Detroit numbers operations which was set forth in the affidavit of the previous day. After repeating the opening paragraphs of the earlier affidavit verbatim, it was limited to a statement of the results of the search of the Wingate residence and the assertion that the evidence gained in this search established probable cause for a search of safety deposit box # 127. The magistrate was entitled to consider the October 6th affidavit in conjunction with the one presented the following day in determining whether probable cause had been established for a search of the bank box of appellants. Both affidavits referred to the same eighteen-month investigation and the alleged complicity of James Wingate in the Detroit numbers operations. The second affidavit referred specifically to the search warrant which the magistrate had issued the previous day.

536 F.2d at 702. *See also United States v. Dudek*, 560 F.2d 1288 (6th Cir. 1977), *cert. denied*, 434 U.S. 1037, 98 S.Ct. 774, 54 L.Ed.2d 786 (1978); *United States v. Cortellesso*, 601 F.2d 28 (6th Cir. 1979), *cert. denied*, 444 U.S. 1072, 100 S.Ct. 1016, 62 L.Ed.2d 753 (1980).

The two warrants read together establish a sufficient nexus between the contents of items seized in the first search and the contents of the items described in the second search warrant. Because the magistrate and the investigating officer had viewed the contents of the items seized in the first search, they had probable cause to believe the materials listed in the second warrant were obscene.

In reviewing this case, we must remember that the Supreme Court has specifically

stated that the magistrate need not view a film before seizing it. *Heller v. New York,* 413 U.S. 483, 488, 93 S.Ct. 2789, 2792, 37 L.Ed.2d 745 (1973). "In dealing with probable cause . . . as the very name implies, we deal with probabilities." *Brinegar v. United States,* 338 U.S. 160, 175, 69 S.Ct. 1302, 1310, 93 L.Ed. 1879 (1949). Furthermore, "deference is to be accorded an independent judicial officer's finding of probable cause, with doubtful cases governed largely by the preference which our legal system gives to warrants." *United States v. Jenkins,* 525 F.2d 819, 824 (6th Cir. 1975). *See Spinelli v. United States,* 393 U.S. 410, 419, 89 S.Ct. 584, 590, 21 L.Ed.2d 637 (1969).

In summary, we have already found that the initial search complied with the rule of *Marcus v. Search Warrant.* Rather than seizing other apparently obscene material, the agents recorded what they observed in plain view. The agents could not view the *contents* of the material without violating the appellant's privacy rights and other rights under the First and Fourth Amendments. *See, e.g., United States v. Gray.* Therefore, they did the only thing they could do. They returned to the magistrate and sought his independent determination concerning probable cause to seize materials which appeared to be of a similar nature. The materials bore similar pornographic covers and suggestive titles and were in the same location as the first group of materials. Thus, viewing the second affidavit in light of the existing circumstances and the results of the first search, the magistrate had ample evidence for a finding of probable cause under the *Miller* standard.

Appellant contends that the second warrant is facially overbroad because of the phrase which authorizes the seizure of "other magazines and movies of the same kind and nature." Appellant argues that this clause turns the warrant into a "general warrant," or "a general, exploratory rummaging in a person's belongings" which the Fourth Amendment prohibits. *Coolidge v. New Hampshire,* 403 U.S. at 467, 91 S.Ct. at 2038. This charge is even more serious where the items to be seized have the presumptive protection of the First Amendment—*i.e.,* books and the ideas they contain. *Stanford v. Texas,* 379 U.S. 476, 485, 85 S.Ct. 506, 511, 13 L.Ed.2d 431 (1965).

[8, 9] However, appellant admits that the agents seized only magazines and movies listed in the exhibit attached to the warrant. Therefore, the materials received the required protection under the second warrant. We refuse to invalidate the entire warrant as appellant requests. Where the police and the issuing magistrate have listed the titles of the primary targets of the search, we will not invalidate the entire warrant. Rather, we will sever and invalidate those portions containing the overbroad language and allow the items seized under the proper section to stand as evidence. *United States v. Espinoza,* 641 F.2d at 164–65; *United States v. Torch,* 609 F.2d 1088, 1089–90 (4th Cir. 1979), *cert. denied,* 446 U.S. 957, 100 S.Ct. 2928, 64 L.Ed.2d 815 (1980). *See also* W. LaFave, 2 *Search and Seizure: A Treatise on the Fourth Amendment,* § 4.6(f) (1978).

Appellant attempts to compare the facts of this case to the facts of *Marcus* and *Lo-Ji.* We see no analogy. In both of those cases the authorities made little or no attempt to identify beforehand the materials to be seized. Instead, the executing officers exercised "unfettered discretion" to seize whatever materials they thought were obscene. This is the evil which the Supreme Court sought to avoid when it stated that the items to be seized must be described with "scrupulous exactitude." *Stanford v. Texas,* 379 U.S. at 485, 85 S.Ct. 511. Here, by contrast, the authorities have not exercised unfettered discretion, but have seized only those items specifically designated. We will not overturn solid police work for errors which resulted in no harm.

[10] Finally, Sovereign News argues that the warrant does not describe the seized business records with sufficient particularity. However, business records do not enjoy the same level of First Amendment protection as non-obscene books and magazines. *Stanford v. Texas,* 379 U.S. at 485 n. 16, 85 S.Ct. at 512 n. 16; *Marron v.*

United States, 275 U.S. 192, 198–99, 48 S.Ct. 74, 76–77, 72 L.Ed. 231 (1927); *United States v. Torch,* 609 F.2d at 1090. The magistrate was entitled to describe these items generically in the warrant, since any greater specificity with regard to these items is virtually impossible. *United States v. Cortellesso,* 601 F.2d at 33; *United States v. Jacobs,* 513 F.2d 564 (9th Cir. 1975). *Cf. Andresen v. Maryland,* 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

In conclusion, we find no constitutional error in either the issuance or execution of either warrant.

III. Subsequent Return of the Copies

[11] We now turn our attention to the subsequent disposition of the copies. "The general rule is that seized property, other than contraband, should be returned to the rightful owner after the criminal proceedings have terminated." *United States v. Francis,* 646 F.2d 251, 262 (6th Cir. 1981); *United States v. LaFatch,* 565 F.2d 81, 83 (6th Cir. 1977), *cert. denied,* 435 U.S. 971, 98 S.Ct. 1611, 56 L.Ed.2d 62 (1978). This is true whether or not the original seizure was lawful. *United States v. Francis,* 646 F.2d at 262, n. 7. Where the former defendant in criminal proceedings can show a property interest in the copies, the government must return them. Thus, the initial issue is whether Sovereign News can show a sufficient property interest in the copies to demand their return.

[12] The United States contends that Sovereign News does not have a property interest because the copies are "business records." This argument is based upon *United States v. King,* 528 F.2d 68, 69 (9th Cir. 1975) where the court refused to order the government to surrender transcripts of defendant's telephone conversations recorded by the government. Ruling on a Rule 41(e) motion the court held that defendant had not demonstrated entitlement to "lawful possession of the property which was illegally seized" as required by 41(e). *Id.* at 69. "He is no more the owner of the tapes and transcripts of the conversations made by the government than he is the owner of the mental impressions and memories of the government agents who intercepted the conversations." *Id.* In this case, however, Sovereign News has a property interest in the copies because the business records copied were the sole property of Sovereign News. Therefore, Sovereign News has a right to the return of the copies.

However, we must balance this right against the legitimate needs of the United States. We agree that the government has a right to copy documents lawfully in its possession. *United States v. Ponder,* 444 F.2d 816, 820 (5th Cir. 1971), *cert. denied,* 405 U.S. 918, 92 S.Ct. 944, 30 L.Ed.2d 788 (1972). *United States v. Chapman,* 559 F.2d 402, 405 (5th Cir. 1977). We also agree that "[a] defendant's motion for return of property will be unavailing where the government has a continuing interest in the property." *United States v. Francis,* 646 F.2d 251, 263 (6th Cir. 1981). *United States v. Premises Known as 608 Taylor Avenue,* 584 F.2d 1297, 1303 (3d Cir. 1978). This "continuing interest" can include a criminal or tax investigation in progress. *Warden v. Hayden,* 387 U.S. 294, 307, 87 S.Ct. 1642, 1650, 18 L.Ed.2d 782 (1967); *United States v. One Residence and Attached Garage, etc.,* 603 F.2d 1231, 1234 (7th Cir. 1979). However, we hold that when the government has held the copies for a "reasonable time" and has no investigations in progress, it must return the copies as well as the originals. *Mr. Lucky Messenger Service v. United States,* 587 F.2d at 17; *cf. United States v. Wallace & Tiernan Company,* 336 U.S. 793, 800–801, 69 S.Ct. 824, 828, 93 L.Ed. 1042 (1948).

The United States contends that it can keep the copies indefinitely since it seized the originals lawfully. It bases this conclusion on *United States v. Chapman,* 559 F.2d 402 (5th Cir. 1977). We decline to interpret *Chapman* so broadly. The *Chapman* court decided that the United States properly retained copies of gambling records to investigate tax questions concerning the defendants. Apparently, there was a legitimate use for the records. In the present case, we can conceive of no legitimate purpose for retaining these documents if the United

States contemplates no actual use for them. The government may not keep the copies purely for the sake of keeping them or because it is "hopeful" they may be relevant to some future investigation. *United States v. Moore,* 423 F.Supp. 858, 859–60 (S.D.W.Va.1976). This amounts to harassment.

Therefore, on remand, the District Court should require the government to show cause why it is retaining these copies. If the copies are needed for an ongoing or proposed specific investigation, the government is entitled to retain them. *See, e.g., United States v. Chapman, United States v. Murphy,* 413 F.2d 1129, 1140 (6th Cir.), *cert. denied,* 396 U.S. 896, 90 S.Ct. 195, 24 L.Ed.2d 174 (1969). If the materials are being used for grand jury proceedings, we refer the court to the three tests set forth in *In re Grand Jury Proceedings,* 507 F.2d 963 (3d Cir. 1975). Those tests require a showing that the materials were (1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose such as harassment. *Id.* at 966. In order to protect the secrecy of the grand jury, the court may wish to hold the hearing *in camera. See Mr. Lucky Messenger Service v. United States,* 587 F.2d at 17; *Shea v. Gabriel,* 520 F.2d 879, 882 (1st Cir. 1975).

In summary, we hold that this court has jurisdiction to hear the case because the District Court's order denying return of the copies was a final order. Next, we hold that the searches of March 19 and 25, 1975 were valid and legal searches. Finally, we hold that since the appellant has demonstrated an undivided property interest in the copies of the business records, it is entitled to immediate return of the copies unless the government can demonstrate that the copies are necessary for a specific investigation. We therefore affirm the order of the District Court and remand the case for further proceedings consistent with this opinion.

Joseph STASZAK (81–1476) and Richard Staszak (81–1462), Plaintiffs-Appellants,

v.

Walter ROMANIK, Defendant-Appellee.

Nos. 81–1462, 81–1476.

United States Court of Appeals, Sixth Circuit.

Argued June 14, 1982.

Decided Oct. 7, 1982.

Two of three partners in partnership appealed from a judgment of the United States District Court for the Eastern District of Michigan in a diversity action between the partners. The Court of Appeals, Lively, Circuit Judge, held that: (1) the evidence was insufficient to sustain the finding that third partner made no contribution to the capital of the partnership since he made contributions of capital by withdrawing less than his total share of partnership profits, and thus even though partner breached his partnership duties by failing to move to Michigan and work full time for the partnership, other partners were entitled to recover only damages which such breach caused the partnership, and forfeiture of partner's interest was not a permitted sanction for the breach, and (2) the evidence was sufficient to sustain the finding that the parties did not intend that the partnership agreement would cover assets of the earlier partnership created by two of the partners, and thus where the former property of the two-person partnership was conveyed to three-person partnership, such property would be included in the final accounting of the three-person partnership and treated as a later contribution of capital by the two partners.

Reversed and remanded.

1. Partnership ⇐57

Where two original partners in Christmas tree business entered into partnership

U.S. Department of Justice

Washington, D.C. 20530

JUL 13 1984

DJA:RGreenberg:stl
145-12-3526

Telephone:
(202) 633-3368

Mr. Joseph E. diGenova
United States Attorney
District of Columbia
3rd & Constitution Ave., N.W.
Washington, D.C. 20001

Re: Founding Church of Scientology v. Director, FBI, et al., C. A. No. 78-0107 (D.D.C.)

Dear Mr. diGenova:

Pursuant to discussions between Richard Greenberg of my staff and Ms. Judith Hetherton this week, this is to request that access to the documents seized by the Federal Bureau of Investigation from the Founding Church of California on July 8, 1977, be provided to the Civil Division of the Department of Justice acting in its capacity as counsel for the defendants in the above-entitled action. Such access is authorized pursuant to paragraph 8 of the disposition agreement concerning the documents which is reprinted at United States v. Heldt, 668 F.2d 1238, 1287 (D.C. Cir. 1981). Of course, we will comply with the pertinent provisions of the disposition agreement prior to publicly disclosing or disseminating the documents. In addition, out of an abundance of caution and to ensure that the Church has an opportunity to protect whatever rights it may believe it has with respect to these documents, it might be appropriate for a letter to be addressed to the Church advising of this request for access to the documents.

The documents for which access is sought appear to contain information pertaining to misconduct of the Founding Church of Scientology, its statewide units and its members. This information may be critical to the defendants' ability to demonstrate that plaintiffs in the above-entitled action are not entitled to injunctive relief due to their unclean hands. By Order dated June 25, 1984, Judge Joyce Hens Green has authorized the defendants to commence discovery pertaining to plaintiffs' unclean hands, and inspection of these documents will facilitate our defense of the action.

Thank you for your assistance with this matter. If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

David J. Anderson

DAVID J. ANDERSON
Branch Director
Federal Programs Branch
Civil Division